IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

EMMA JANE PROSPERO, Plaintiff, vs. DEPUTY RYAN SULLIVAN, All former or current employees of the Camden County Sheriff's Office who are sued in their individual capacities, LT. RUSSELL PRESCOTT, All former or current employees of the Camden County Sheriff's Office who are sued in their individual capacities, SHERIFF JAMES PROCTOR, Current employees of the Camden County Sheriff's Office who are sued in their individual capacities, Defendants.	)	CASE NO. 2:20-CV-00110-LGW-BWC

MOTIONS HEARING
BEFORE THE HONORABLE LISA GODBEY WOOD
September 8, 2021; 10:00 a.m.
Brunswick, Georgia

APPEARANCES:

For the Plaintiff: CLARE NORINS, Esq.
University of Georgia School of Law
First Amendment Clinic
P. O. Box 388
Athens, Georgia 30603
(706) 227-5421
cnorins@uga.edu

For the Defendants: BRADLEY J. WATKINS, Esq.
Brown, Readdick, Bumgartner, Carter Strickland & Watkins
P. O. Box 220 (31521)
5 Glynn Avenue
Brunswick, Georgia 31520
(912) 264-8544
bwatkins@brbcsw.com

Reported by: Debbie Gilbert, RPR, CCR
Official Court Reporter
801 Gloucester Street
Post Office Box 1894
Brunswick, GA 31521-1894
(912) 262-2608 or (912) 266-6006
debra_gilbert@gas.uscourts.gov

- - -

P R O C E E D I N G S

(Call to order at 10:05 a.m.)

THE COURT: Good morning.

SPEAKERS: Good morning.

THE COURT: Ms. Sharp, call the next case.

THE CLERK: Case 2:20-CV-110, Emma Jane Prospero versus Deputy Ryan Sullivan, Lieutenant Russell Prescott. Clare Norins for the plaintiff; Bradley Watkins for the defendant.

THE COURT: Ready for the plaintiff? And ready for the Defense?

MR. WATKINS: Yes, Your Honor.

THE COURT: We do have two motions pending. The first was filed by the plaintiff, that being the second motion to amend the complaint, and then we have the motion for a judgment on the pleadings filed by the Defense, and I am going to take up the motion to amend first because, depending on how that comes out, it will affect whether the defense motion is mooted and needs to be reurged at a different time.

I have, of course, read all of the briefs that have been submitted with regard to both issues including the ones that were filed very recently by each party.

That having been said, Ms. Norins, let me call on you to proceed on behalf of your motion. If you will come to the podium, and, like I said, I have read all that's been submitted in writing, but this is your opportunity to add anything you

would like with regard to your written product.

MS. NORINS: Thank you, Your Honor. Good morning, may it please The Court, my name is Clare Norins, and I represent the plaintiff, Mrs. Emma Jane Prospero, in this matter.

Plaintiff has shown good cause to amend her complaint to add a deliberate indifference hiring claim against Sheriff Proctor based on his decision to hire Deputy Ryan Sullivan, notwithstanding his prior history of initiating unconstitutional Fourth Amendment seizures. This is the same type of injury that the plaintiff suffered here.

THE COURT: Let me stop you there and ask.

MS. NORINS: Sure.

THE COURT: Am I correct that I understand from your briefing at this point although initially you had thought about adding two defendants, now it would just be the sheriff; is that correct?

MS. NORINS: That's correct. He is the ultimate hiring authority for the sheriff's department.

THE COURT: And not Byerly?

MS. NORINS: Correct. So Sheriff Proctor knew from Deputy Sullivan's employment application that he had been fired from the Brunswick Police Department after less than two years of employment here, but the sheriff failed to speak to any of Sullivan's prior supervisors or to request his disciplinary records.

Had the sheriff or his nominees done so, he would have seen that among the 19 different infractions on Sullivan's record there were five documented incidents of unconstitutional Fourth Amendment seizures. There was one warrantless arrest without probable cause, one request for a warrant without probable cause and at least four stops without articulable suspicion, and this is all contained in Plaintiff's Exhibit F to our motion.

Sullivan's disciplinary record further contained a counseling memo from his supervisor stating that Sullivan had been making borderline cases and cases that were clear violations of people's rights.

That counseling memo went on to note that when supervisors tried to instruct Sullivan on relevant Supreme Court precedent about Fourth Amendment seizures, Sullivan's response was "I disagree with that" and this is also contained in Plaintiff's Exhibit F, and so we plead that this disciplinary history, which is documented in Sullivan's Brunswick employment file, would have put any reasonable hiring authority on notice that Sullivan was highly likely to initiate Fourth Amendment seizures without probable cause in the future.

THE COURT: Is it your contention that Proctor acted with malice or deliberate indifference?

MS. NORINS: It is our contention that he acted with deliberate indifference by not speaking to any of Sullivan's

prior supervisors or requesting his disciplinary file.

THE COURT: Amounting to a deliberate intent to injure?

MS. NORINS: Well, under a Section 1983 deliberate indifference claim, you don't have the same malice requirement that you would have under the state negligent hiring claim, so the Supreme Court standard for a deliberate indifference in hiring claim comes from Bryan County v. Brown. This 520 US 397, and the Supreme Court there stated that a deliberate indifference claim arises where a plaintiff can show that adequate scrutiny -- that's their language -- of a defendant's past employment history would have revealed prior constitutional violations that would lead a reasonable hiring authority to conclude that it was highly likely or an obvious consequence that this defendant would again engage in that same kind of constitutional violation in the future.

THE COURT: And that's my question. I was just wondering which basket your allegations would go into, and while you don't go so far as to allege a deliberate intent to injure, you do allege a deliberate indifference.

MS. NORINS: Correct, Your Honor.

THE COURT: What about the Defense's argument that all this would be futile?

MS. NORINS: Sure. So defendants are trying to convert this into a summary judgment motion by submitting their declarations and their evidence as to why what they did do they

believe was sufficient.

THE COURT: You mean in the way of the affidavit and the call?

MS. NORINS: Right, and we would submit that it's premature to reach the merits of whether what they did was sufficient or not because we have established our prime fascia pleading. We have made out all the elements of deliberate indifference under Brown, and we should be allowed to go forward and have discovery on that claim.

Then we can come back and Defendants can make their arguments about what they did they believe to be sufficient. I mean, we -- I can speak to why we think it wasn't sufficient but I think we're premature to get to that.

THE COURT: What about with regard to statute of limitations?

MS. NORINS: So the statute of limitations on this case would start to run at the time that the charges were resolved in Mrs. Prospero's favor.

THE COURT: So that was November.

MS. NORINS: That was November of 2019, so we are well within the two-year period. Many of the cases that Defendant cited to involved warrantless arrests where the statute does run from the time of arrest, and that's not the case here because Mrs. Prospero was arrested pursuant to legal process pursuant to the warrant that Sullivan obtained, and we've cited to cases

both from the Supreme Court and the Eleventh Circuit that say for a malicious prosecution case, which is what this is, the statute runs from when the charges are resolved in the plaintiff's favor.

THE COURT: So looking at Rule 16, you would say you have good cause because --

MS. NORINS: Because why?

THE COURT: -- they should have produced the information and you couldn't have received or...

MS. NORINS: So this late amendment arises out of failures or out of Defendants' representation that they would produce the disciplinary history for Sullivan. We requested that in our very first written discovery demands back in December of 2020.

In January 2021, they said in their written responses that they would be producing his personnel file, which they said would contain his disciplinary history.

They never produced that file until after we filed our current motion to amend but what they did do was submit interrogatories, supplemental interrogatory responses, where they disclosed that Sullivan had been dismissed from the Brunswick Police Department, and that was the first we learned that he had worked in Brunswick or been terminated, so the very day we got those supplemental responses, we subpoenaed Brunswick for his full file. Took about two days to get that and

approximately three days later we moved to amend, so we were very prompt and we've cited to case law that says we are allowed to rely on Defendants' representation that they were going to produce that to us and we weren't required to go out and try to get it from third parties because they had told us that they were going to turn it over.

THE COURT: If I were to grant this motion, then how far would that set us back as far as going back and redoing discovery and opening up further discovery? What is it that Plaintiff would have in mind?

MS. NORINS: So we would want to try to locate and speak to the supervisors who did make the decision to terminate Sullivan from Brunswick and who did discipline him for prior incidents.

You know, the termination was really the culmination of the progressive disciplinary policy. There were multiple infractions and lesser disciplines before the termination, so we would want to, you know, speak to the people that actually directly supervised him and had disciplined him, find out what they have to say. We would need to recall Sheriff Proctor and Captain -- or I believe he's now Major Byerly because it --

THE COURT: For the limited purpose of --

MS. NORINS: For the limited purpose of exploring this hiring issue. I'm not saying that's all we would need to do, but that's what comes to mind going into it that we would want

to discover.

THE COURT: All right, Ms. Norins, thank you. Let me turn across the aisle and hear from Mr. Watkins.

MS. NORINS: Okay.

THE COURT: And then I will turn back to you in brief reply on this motion.

MS. NORINS: I appreciate it.

THE COURT: Yes, thank you. All right, Mr. Watkins.

MR. WATKINS: Thank you, Judge.

I know, it sounds like you're well familiar with the issues we are talking about in terms of potentially adding this claim.

Our defenses are two-fold. One, there is no anchoring claim. We will determine that when we argue the motion for judgment on the pleadings, which there needs to be for this claim to be added, and Number 2, we claim that this claim would be futile if added.

The Court asked about our statute of limitation defense that was raised in our motion, and we think the plaintiff is correct in that the two-year runs from the date of resolution of the criminal charge.

I will say that initially The Court will recall that the plaintiffs asked to conduct discovery before the suit was answered --

THE COURT: Partially granted.

MR. WATKINS: -- based on the fact that they claimed the statute was about to run on the timetable we alleged in our brief because, keep in mind, the plaintiffs pled this also as a false arrest claim.

It is a malicious prosecution claim because it was undertaken pursuant to a warrant, but to the extent we were mistaken about the statute of limitation, based on the breadth of claims asserted, the plaintiffs took that same position when suit was filed, but for purposes of today, we're arguing about whether there is an anchoring claim and whether asserting that claim would be futile.

I think the plaintiff stated the accurate standard, which is a very tough standard to meet. Again it's whether there is evidence that the sheriff was deliberately indifferent to a, quote, highly predictable consequence that hiring Sullivan would result in the deprivation -- and this is the important part -- of the particular constitutional rights violation alleged in this case, and what's alleged in this case is not what was referenced in the Brunswick personnel file, which is that he was insubordinate, that he had multiple policy violations, that he didn't report to work or even that he was making questionable consensual and counter stops without articulable reasonable suspicion.

This isn't a stop case. This is a case where they allege that Sullivan misrepresented facts in an affidavit, that

he alleged misstatements, false statements in an affidavit, and that he omitted things in that affidavit, and so what we did in our brief is we rely on a case that's really remarkably similar that involves a warrant application complaint against an officer. That case is Perrin v. The City of Elberton. It's a Middle District of Georgia 2005 case, 2005 Westlaw 1563530.

In that case, the officer was alleged to have used an unsworn warrant application, and there was plenty in this officer's background. He also had been terminated like the officer in this case.

In his background, there were complaints of -- he had been terminated from another police force. There were complaints of him using excessive force, of being involved in a police chase in which two minors and an adult were killed and various other issues, and what The Court said is that there was nothing in this officer's background that would establish that deliberate indifferent standard that it was highly likely and probable that he would commit the particular offense alleged in this case.

And I will submit that there is -- and we cite other cases we think is similar as well, but I will submit that it is not clearly established -- of course, we would raise a qualified immunity case -- that a sheriff's department must talk to an applicant's former employer or, as they suggest, send an open records request for a personnel file.

It's just not in the case law, and so they would have to show that it's clearly established, in order for this claim not to be futile, that that's the standard.

What we do know they did -- and I think not just the affidavits we submitted, whether The Court considers them or not, they are not made pursuant to our motion to dismiss.

They are made pursuant to their motion to add, but regardless, I believe they've put in the record information about the POST certification records and what these POST certification records suggest is that he was eligible to be hired.

They had investigated. They determined that there was no further action necessary to be taken, and they indicated he was eligible and certified to be hired as a law enforcement officer, and so what The Court would have to decide is that's not enough. A police department can't say, "Well, I've checked the POST records; he's eligible to be hired; he's certified to be hired." Now you've got to go to this extra step because it's clearly established. You need to make phone calls and send open records requests. It's just not the standard.

So this claim is futile. They didn't make it as a state law claim, which I initially thought they did. That obviously would have its own problems with there not being malice and official immunity, but our position is this claim can't survive and we ask The Court not to allow it to go forward because I can

tell The Court the breadth of discovery in this case has already been pretty enormous, and if this claim is added, which we think would be eventually futile and subject to a motion to dismiss or a motion for summary judgment, the amount of discovery that would be undertaken on this claim would be immense, and so we ask The Court to deny their motion to add this claim.

THE COURT: All right, thank you, Mr. Watkins.

Briefly in reply, Ms. Norins.

MS. NORINS: Yes.

So a couple of points, Your Honor. First of all, Defendants claim that we have to show it was clearly established that the sheriff would have to speak to prior supervisors and request a personnel file, and we believe that is clearly established under Brown. This is a Supreme Court standard.

It says, "To test the link between the hiring decision and plaintiff's injury, we must ask whether a full review of the defendant's record would have put the hiring authority on notice that the defendant was likely to commit the same type of constitutional violation again," and that's Brown at 520 US at 412 to 413, so it's talking about the full record, which would include speaking to supervisors or requesting the file.

Then we have the Eleventh Circuit's decision in Griffin v. City of Opelika, 261 F3rd 1295 from 2001, which upheld a deliberate indifference claim where the current employer was aware of past misconduct by the defendant but failed to speak to

the defendant's prior employer and failed to request the defendant's employment file and therefore failed to uncover a history of prior bad acts of the same type or genre as the current bad act, so we believe that the City of Opelika establishes that there was this clear duty to do more than just check the POST records but to also look at the full record of Sullivan's employment with Brunswick.

They also make this point that he had never, while at Brunswick -- I'm talking about Sullivan -- had never been alleged to falsify a warrant application.

We actually don't know that yet because we haven't had discovery of what occurred with the one warrant that he did try to request without probable cause.

We also are not required to show with such particularity that he engaged in exactly the same kind of misconduct. The cases, and particularly Brown, speak to it has to be the same type of constitutional violation, so, for instance, prior incidents of excessive force that Sullivan had maybe engaged in at Brunswick would not help us.

THE COURT: One time a TASER, one time a gun.

MS. NORINS: Right.

THE COURT: That would help but not in an arrest type --

MS. NORINS: Not in our case because we don't have an excessive force claim, but the incidents that we point to in his past all involve unconstitutional Fourth Amendment seizures.

They are all the same type or genre of constitutional violation, and that's all that the law requires us to show. We don't have to show a prior case on all fours with our case.

And then defendants also pointed to a case, City of Elberton, Perrin versus City of Elberton, and there the issue was exactly what we were just talking about, that the history really didn't relate to the current injury.

There the plaintiff had accused the defendant officer of violating his federal rights by applying for a warrant using an unsworn affidavit, and the prior history and the disciplinary records show that he had excessive force complaints and maybe some other types of complaints but nothing relating to any kind of unlawful Fourth Amendment seizure, and so there the history and the current injury simply were not related, and that is not the situation in our case.

THE COURT: Thank you, Ms. Norins.

MS. NORINS: Thank you.

THE COURT: Counsel, here is how we will proceed. As to Docket Entry 22 -- that is the second motion to amend the complaint by the plaintiff -- I am going to grant that motion and find under Rule 16(b)(4) good cause for the amendment.

However, I am going to impose a timeline for any additional discovery that addresses that amendment.

I understand that it -- the added complaint will be against just one defendant and I will permit the parties an

additional 90 days to conduct and complete any discovery regarding that amendment, and if there's any discovery disputes that arise, rather than get us off track, the magistrate judge is going to be able to even handle things on the phone if necessary so we can go ahead and get to the bottom of the case.

MS. NORINS: Sure.

THE COURT: In granting the motion at Docket 22, I find then that the motion at Docket 23, the motion for judgment on the pleadings of the complaint, as it now stands, is mooted and the defendant will not in any way or the defendants will not in any way be penalized from reasserting those arguments along with any other that come up based on the amended complaint at the time in the future.

MS. NORINS: Thank you, Your Honor. Could I ask when the 90 days will start to run because we were in the middle of discovery and it was stayed?

THE COURT: How many days do you have left? When does discovery end?

MS. NORINS: It was -- I feel like we were about halfway -- we had just gotten an extension when it was stayed.

THE COURT: My intention is for that to run concurrent with whatever is still in place and if you have time left over beyond --

MS. NORINS: Could we perhaps, taking that 90 days into account, submit a schedule?

THE COURT: For example, what I mean is if you have a hundred days of discovery left, then just run those a hundred. If you have 60 days, this gives you 30 additional, do you understand?

MS. NORINS: Okay, got it. Thank you.

THE COURT: And go ahead and file on the docket, even though you have a proposed, go ahead and file your second amended complaint on the docket within three days.

MS. NORINS: Okay.

THE COURT: All right, counsel, anything else we can cover at this point while everyone is here together? Mr. Watkins, anything else on behalf of the Defense?

MR. WATKINS: No, and just for my edification, to be clear, the disposition of the motion for judgment on the pleadings is disposed of as moot at this point pending --

THE COURT: Correct, and you reurge it and you can modify it in the future once you see that complaint that is filed.

MR. WATKINS: In other words, there's not going to be any prohibition against me asserting those same legal defenses once that amended complaint is --

THE COURT: That's exactly right. That's exactly right. All right. On behalf of the plaintiff, anything further that we can resolve with everyone here this morning?

MS. NORINS: No, Your Honor, thank you.

THE COURT: All right, counsel, we will be in recess.

(Proceeding concluded at 10:29 a.m.)

CERTIFICATION

I certify that the foregoing is a true and correct transcript of the stenographic record of the above-mentioned matter.

_____ 09/26/2021

Debra Gilbert, Court Reporter Date